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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MICHELLE ASHTON

Petitioner

V.

UNITED STATES OF AMERICA

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Upon conviction by a jury for a multiple object conspiracy, where the objects of the conspiracy bear different levels of severity under the Federal Sentencing Guidelines, does the Guidelines' delegation to the trial court of the determination of the defendant's guilt as to the object of the conspiracy carrying the most severe sentence violate due process and the defendant's constitutional right to a jury trial?
2. Does a jury instruction which defines "reasonable doubt" as a "doubt for which you can give a reason" and as such a doubt as would cause a juror to be "so undecided that he cannot say he has an abiding conviction of the defendant's guilt" unconstitutionally elevate the

degree of doubt required for acquittal?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 991 F.2d 819 (D.C. Cir. 1993) reh. denied (June 16, 1993).[1]

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[1] In these consolidated criminal cases brought by the United States of America, the defendants were Michelle Ashton, David M. Dale, Martin Segal, Terence Sweeney and Automated Data Management, Inc.

App. 1a-70a.[2] No memorandum opinions of the District Court relevant to the issues presented herein have been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1993. Motions for Rehearing or for Rehearing **En Banc** were denied on June 16, 1993. App. 172a. On July 14, 1993, the Court of Appeals granted Petitioner's Motion for Stay of the Mandate. App. 174a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States, 18 U.S.C. § 371, 26 U.S.C. § 7201 and 26 U.S.C. § 7206, and U.S.S.G. § 1B1.2;

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[2] "App.," refers to the separately bound appendix to this petition for a writ of certiorari.

§ 2F1.1; § 2T1.1; § 2T4.1 and § 3D1.2, including relevant commentary, are set out in the Appendix.

STATEMENT OF THE CASE

Petitioner Michelle Ashton ("Ashton") is the majority shareholder of Automated Data Management, Inc. ("ADM"), which she founded in 1980. App. 4a. During the relevant time frame of the indictment, ADM provided computers, software, and related training and maintenance to various governmental agencies, pursuant to the Small Business Administration's Section 8(a) minority set-aside program. App. 4a. In early 1985 ADM was awarded a large contract with the Department of Defense to supply computers and related goods and services to Army bases in the United States, Europe and Asia. App. 4a.

To service this contract, ADM opened offices in South Korea and Germany, and

hired new vice presidents to manage each office. App. 4a. These foreign offices operated under the provisions of the Status of Forces Agreements ("SOFA") which restricted their ability to conduct business with parties other than the United States government. App. 5a.

David Bowers ("Bowers"), the Vice-President in charge of ADM's Korean operations, determined that ADM should attempt to take advantage of non-SOFA business opportunities. App. 5a. After consulting with David Dale ("Dale"), who had been hired in late 1984 as ADM's Executive Vice-President, Bowers formed a corporation based in Guam and purchased a number of "shell" Hong Kong corporations. App. 5a. Ownership of those corporations was transferred to Ashton, Dale and Bowers. Id. Similar arrangements were

made by ADM officers and consultants in Germany. App. 5a.

In 1990, Ashton, Dale, ADM, and several ADM officers and employees were indicted in the United States District Court for the District of Columbia for a number of offenses arising from transactions involving ADM's foreign offices and the related foreign corporations.[3] Count One of the indictment alleged a multiple object conspiracy to defraud the United States by attempting to evade the payment of personal and corporate taxes, in violation of 26 U.S.C. §§ 7201 and 7206, and by willfully making false statements

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[3] Ashton was indicted on charges of (Count One) conspiracy (18 U.S.C. § 371), (Count Three) aiding and assisting preparation of a false tax return (26 U.S.C. § 7206(2)), (Count Four) attempted tax evasion (26 U.S.C. § 7201), (Count Five) wire fraud (18 U.S.C. § 1343), and three counts of violations of 18 U.S.C. § 1001 and 18 U.S.C. § 2 (Counts Six, Eight and Ten). App. 14a.

and concealing material facts from governmental agencies in violation of 18 U.S.C. § 1001. App. 14a.

The tax evasion object of the conspiracy count and the substantive tax offenses centered on allegations that the defendants had attempted to divert and conceal taxable income by, among a number of diverse means, utilizing purported transactions between ADM and its related overseas companies to create phony tax deductions. App. 118a-123a.[4] The false statement object of the conspiracy and the substantive false statement offenses were anchored by allegations that Ashton and Dale had lied on certain forms they had

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[4] The government's principal witness regarding the attempted tax evasion was Bowers, who had resigned from ADM in August, 1987, after secretly tape recording conversations with Ashton and Dale, and looting ADM of hundreds of thousands of dollars. App. 4a, 10a-11a.

submitted to government agencies regarding their affiliation with foreign business interests. App. 127a-128a. Thus, the two conspiratorial objects involved identifiably distinct conduct.

After a lengthy jury trial, Ashton and the co-defendants were convicted of all counts. App. 15a. The Court gave the jury a reasonable doubt instruction which stated in pertinent part:

> [r]easonable doubt, as that name implies, is a doubt based on reason, it is a doubt for which you can give a reason. It is such a doubt as would cause a juror, after careful and candid and impartial consideration of all the evidence, to be so undecided that he cannot say he has an abiding conviction of the defendant's guilt.

App. 57a. (Emphasis added).

As to the conspiracy count, the District Court instructed the jury that proof of one object of the conspiracy was

sufficient for a finding of guilt,[5] and the jury returned a general verdict of guilt on the conspiracy count. The jury was not asked to nor did it make any finding as to whether Ashton was guilty of one or both objects of the conspiracy. App. 59a.

Over the defendants' objections, the District Court found that the Federal Sentencing Guidelines ("the Guidelines") applied to the conspiracy count[6], and

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[5] Court of Appeals Joint Appendix ("C.A. App.") 1666-78.

[6] The conspiracy count was a so-called "straddle offense", i.e. the indictment alleged conduct commencing before but continuing after the implementation of the Guidelines on November 1, 1987. The Circuit Court upheld as not clearly erroneous the District Court's determination that both objects of the conspiracy continued after November 1, 1987, triggering the application of the Guidelines. App. 57a-60a.

sentenced Ashton to 37 months imprisonment as to that count[7]. App. 16a.

Under U.S.S.G. § 2X1.1(a) the "base offense level" for a conspiracy conviction is determined by examining the "base offense level" from the Guidelines for the "object offense." In determining the base offense level for a multiple object conspiracy, the District Court was required by U.S.S.G. § 1B1.2(d) to treat the distinct objects of the conspiracy as separate counts of conviction:

> A conviction on a count charging a conspiracy to commit more than one offense shall be treated as if the defendant had been convicted on a separate count of conspiracy for each offense that the defendant conspired to commit.

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[7] Ashton was sentenced to 30 months on the substantive offenses, all of which were pre-Guidelines offenses, with those sentences to run concurrently with the sentence imposed on Count One. The Court below held that Counts 3 and Count 4 merged for sentencing purposes and remanded for resentencing on those counts. App. 69a-70a.

Application Note 5 of the Commentary to U.S.S.G. § 1B1.2(d) states, inter alia, that:

> Particular care must be taken in applying subsection (d) because there are cases in which the verdict or plea does not establish which offense(s) was the object of the conspiracy. In such cases, subsection (d) should only be applied with respect to an object offense alleged in the conspiracy count if the court, were it sitting as a trier of fact, would convict the defendant of conspiring to commit that object offense. . . .

Both U.S.S.G. § 1B1.2(d) and Application Note 5 were added to the Guidelines effective November 1, 1989 to establish a single standard for the sentencing of defendants convicted of multiple object conspiracies. U.S.S.G. Appendix C, Amendment 75. Application Note 5 was expressly added to "address cases in which the jury's verdict does not specify how many or which offenses were the object of the conspiracy of which the

defendant was convicted." Id. (citations omitted). A reasonable doubt standard is to apply to the trial court's determination of guilt as to an "object offense" since "a higher standard of proof should govern the creation of what is in effect a new count of conviction for the purposes of Chapter Three, Part D. (multiple counts)." Id. (Emphasis added.)

Despite the unambiguous language of U.S.S.G. § 1B1.2(d) and the accompanying Application Notes, the District Court failed to make any factual findings -- let alone a finding beyond a reasonable doubt -- as to Ashton's guilt with respect to the multiple objects set forth in the conspiracy count. Nevertheless, the court below held that the District Court "did make the required determination" by merely adopting the presentence report's conclusory language that "...in this

conspiracy the defendants [Dale and Ashton] attempted to evade both personal and corporate taxes." App. 61a.

Having "found" Ashton "guilty" of the judicially created offense of conspiracy to evade taxes, the District Court performed the requisite grouping of her "two" conspiracy convictions pursuant to U.S.S.G. § 3D1.2, and then applied U.S.S.G. § 3D1.3(a), which mandates that

> the offense level applicable to a Group is the offense level. . . for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the group." (Emphasis added).

The District Court then determined pursuant to U.S.S.G. § 2T1.1 and § 2T4.1 that the base offense level for conspiracy to evade or attempt to evade taxes, with a tax loss between $1,000,000 and $2,000,000

was level 16,[8] or ten levels higher than the base offense level for a conspiracy with a false statement object.[9] As a result, Ashton was subject to a presumptive sentence far greater than that applicable to a conspiracy with a false statement object.[10]

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[8] Calculation of the "tax loss" was also much in controversy below, because the defendants had amended erroneous returns and paid back taxes owed well before they were indicted. App. 62a. However, the Circuit Court held that the calculation of "loss" included the amount the taxpayer evaded "or attempted to evade", citing U.S.S.G. § 2T1.1. Id.

[9] The presentence report expressly concluded that the government had suffered no financial loss attributable to the false statements, a circumstance which would raise the base offense level for a false statement offense or conpsiracy. U.S.S.G. § 2F1.1. C.A.App. 2776 (under seal).

[10] Without adjustments or departures, the Guidelines provide a presumptive sentence of 21 to 27 months for a level 16 offense. With adjustments found by the District Court, Ashton's base offense level was increased to level 21, carrying a presumptive sentence of 37-41 months. By contrast, the Guidelines provide a presumptive sentence at 0-6 months

REASONS FOR GRANTING THE PETITION

A. This Court should resolve a split among the Circuit Courts of Appeal regarding sentencing practice for multiple object conspiracies.

Beginning with Brown v. United States, 299 F.2d 438 (D.C. Cir. 1962) (opinion by then Circuit Judge Burger), the Courts of Appeals in four circuits have held that where there is a general jury verdict finding guilt of conspiracy, any uncertainty as to the object(s) of the conspiracy found by the jury must be resolved in favor of the defendant, even where the defendant has also been convicted of the substantive offenses alleged as the objects. United States v. Owens, 904 F.2d 411 (8th Cir. 1990); Newman v. United States, 817 F.2d 635 (10th Cir. 1987); United States v. Quicksey, 525 F.2d 337 (4th Cir. 1975),

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for a level 6 false statement offense.

cert. denied, 423 U.S. 1087 (1976); United States v. Orozco-Prada, 732 F.2d 1076 (2d Cir.), cert. denied, 469 U.S. 845 (1984).

In each of those cases, the jury found the defendant guilty either of a conspiracy alleging violations of more than one statute, or of a multiple object conspiracy. The Courts of Appeal held in each case that the defendant could only be sentenced on the conspiracy conviction based on that object or offense carrying the least onerous sentence.[11] The implicit rationale for these holdings is that absent a jury trial waiver the law does not permit a trial court to sentence a defendant based on speculation about the jury's intentions, but only for an offense

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[11] In Newman, the court held that the ambiguity of the verdict tainted the guilty finding such that it could not simply be cured by resentencing, and remanded the case for a new trial. 217 F.2d at 639.

for which a jury has in fact convicted the defendant:

> It goes without saying that that sort of conjecture is an impermissible technique in a system of jurisprudence entitling the accused "to have his guilt found by a jury directly and specifically, and not by way of possible inference".

Newman, 817 F.2d at 639, citing Glenn v. United States, 420 F.2d 1323, 1325-26 (D.C. Cir. 1969) (quoting United States v. Di Matteo, 169 F.2d 798, 801 (3rd Cir. 1948).

In conflict with those decisions, the Seventh and Eleventh Circuits have upheld sentencing on a multiple object conspiracy count based upon the most serious substantive offense alleged as an object of the conspiracy if the defendant was also separately convicted of that substantive offense: "it is reasonable to assume that the jury found the defendant

guilty of a conspiracy to commit all five of the substantive offenses listed in Count One." United States v. Peters, 617 F.2d 503, 506 (7th Cir. 1980); Accord, United States v. Harmas, 974 F.2d 1262, 1268 (11th Cir. 1992).

Peters was strongly criticized in Newman, 817 F.2d at 638-39. There, the Tenth Circuit stated that "culpability for conspiracy is not a necessary consequence of a conviction on the predicate offenses." Id. Newman flatly rejected the notion that a "general conviction entails a finding of guilt as to every objective alleged", and noted that where an indictment charges a conspiracy to violate more than one statute, "the jury may find the defendant guilty if it believes the defendant conspired to violate any of the cited statutes." Id. (citations omitted.) Finally, disagreeing

with United States v. Dennis, 786 F.2d 1029 (11th Cir. 1986) cert. denied, 481 U.S. 1037 (1987), the Tenth Circuit held that it was an improper invasion of the province of the jury for an appellate court to "weigh the evidence in the jury's stead." 817 F.2d at 639.

The post-Guidelines cases which have addressed the issue,[12] are, like the pre-Guidelines cases, in direct conflict. See, United States v. Cooper, 966 F.2d 936 (5th Cir. 1992), cert. denied, --- U.S. ---, 113 S.Ct. 481 (1992). Compare United States v. Owens, 904 F.2d 411 (8th Cir. 1990).

In Cooper, the Fifth Circuit recognized the rationale underlying Brown and its progeny, but concluded that the

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[12] Harmas, although decided in 1992, involved conduct which pre-dated the Guidelines.

requirements of U.S.S.G. § 1B1.2 were not inconsistent with Brown, provided that the Guidelines sentence actually imposed for the most onerous object did not exceed the maximum statutory term for the lesser object of the conspiracy. Referring to U.S.S.G. § 1B1.2(d), the Court found that "more than sufficient evidence exists from which the District Court, sitting as a trier of fact, could have found that Cooper conspired to violate..." the statute carrying the more serious sentence. 966 F.2d at 941.[13]

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[13] United States v. Tham, 948 F.2d 1107, 1115 (9th Cir. 1991), cited by the Court below, addressed the application of § 1B1.2(d) in the context of an indictment charging the defendant under 18 U.S.C. § 371 "for two separate conspiracies with two different objects." As with the court below, Tham accepted without explanation or elaboration ofthe procedures set forth in U.S.S.G. § 1B1.2(d) for sentencing in multiple object conspiracy cases.

The court below sub silentio abandoned its own pre-Guidelines precedent in Brown in favor of a myopic application of the Guidelines.[14] Neither Cooper nor the court below recognized, let alone addressed, the myriad constitutional questions raised by the Guidelines' "creation" of a "new count of conviction" by operation of law. (U.S.S.G. § 1B1.2(d); U.S.S.G Appendix C, Amendment 75). Nor did either court question the concomitant delegation to the trial court ("sitting as a trier of fact") of the jury's constitutionally required fact finding function as to guilt.

Whereas Cooper disdained the impact on Guidelines calculations which are dependent upon the gravamen of the

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[14] As authority the court cited only U.S.S.G. § 1B1.2(d) and United States v. Tham, supra.

conspiracy, Owens turned precisely on that issue. Owens held that where the jury returned only a general verdict of guilt in a multiple object conspiracy case, the District Court erred in sentencing Owens based on the conspiratorial object which yielded the highest sentencing range under the Guidelines. 904 F.2d at 415. Although the court in Owens did not specifically address U.S.S.G. § 1B1.2, the only rationale for Owens is the defendants' fundamental right -- recognized in Brown and its progeny -- to a jury determination as to each offense which gives rise to the defendant's actual sentence under the Guidelines.[15]

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[15] Although it is conceded that a special verdict was not required, Griffin v. United States, --- U.S. ---, 112 S. Ct. 466, 116 L.Ed.2d 371 (1991), the ambiguity surrounding the jury's general verdict could have been eliminated by its use. A special verdict may have resulted in discovery of the jury's determination that Ashton was guilty

U.S.S.G. § 1B1.2(d) constitutes an unconstitutional imputation of guilt by a legal fiction created by operation of law, rather than by a jury verdict based on proof beyond a reasonable doubt.[16]

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of Count One solely on the basis of conduct which occurred prior to the effective date of the Guidelines, and/or solely on the basis of the false statement object of the conspiracy. See United States v. Dennis, 786 F.2d 1029 (11th Cir. 1986) (encouraging the government to request the use of special verdicts to remove the ambiguity inherent in a general verdict in a multiple object or multiple offense conspiracy).

[16] Although Peters and Newman were also in conflict, each still hewed to the requirement of a jury verdict as to the offense for which sentence was imposed, with Peters crediting the convictions on the substantive counts as dispositive of the jury findings on the conspiracy counts. By contrast, sentencing pursuant to U.S.S.G. § 1B1.2(d) does not require, nor is it dependent on the existence of convictions for the substantive counts which are alleged as the object(s) of the conspiracy. Under the Guidelines, the harsher result is reached even in the absence of convictions for the substantive offenses, which is not a result which would have been attained under Peters. Only the Guidelines, as approved by Cooper and the court below, omit the need for a jury determination as to the substantive offenses.

Moreover, the Guidelines have not resolved the conflict among the Circuits; to the contrary, the conflict has been elevated to one of constitutional dimension necessitating this Court's intervention.

B. The instruction on reasonable doubt impermissibly altered the burden of proof imposed on the government.

The District court's instruction on "reasonable doubt" required the jurors to have an articulable, explicable reason for an acquittal.[17] Moreover, the requirement in this instruction that the juror have an "abiding conviction", like the requirement of a "moral certainty" which was disapproved in Cage v. Louisiana, 498 U.S. 39

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[17] According to the court below, this instruction has been approved in the local and federal courts in the District of Columbia since Moore v. United States, 120 U.S.App.D.C. 203, 345 F.2d 97 (D.C. Cir. 1965) and has been incorporated into the uniform jury instruction for the District of Columbia. App. 57a.

(1990), distracts the jurors from their mission of achieving evidentiary certainty, as required in Cage. See also, Perez v. Irwin, 963 F.2d 499, 502 (2nd Cir. 1992). As such, this instruction, viewed as a whole, creates a reasonable likelihood that the jury applied the instruction in a way that diminished the burden of proof which the Constitution imposes upon the government, and requires reversal of Ashton's convictions. In re Winship, 397 U.S. 358 (1970); Cage v. Louisiana, 498 U.S. 39 (1990); Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990); Estelle v. McGuire, --- U.S. ---, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Sullivan v. Louisiana, --- U.S. ---, 113 S.Ct. 2078 (June 1, 1993).

The extent of confusion and diversity of practice in state and federal courts

which surrounds the defining of reasonable doubt, and whether a definitional instruction is even required is well summarized in United States v. Nolasco, 926 F.2d 869 (9th Cir. en banc 1991), cert. denied, --- U.S. ---, 112 S. Ct. 111 (1991). Cage and Boyde make compelling the need for a clear "reasonable doubt" instruction approved by this Court to provide affirmative guidance to federal and state courts; Sullivan v. Louisiana makes the prompt resolution of this issue vital.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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